No. 94-197

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; AND RUSSELL S. GOULD, DIRECTOR, CALIFORNIA DEPARTMENT OF FINANCE,

Petitioners,

v.

DESHAWN GREEN, DEBBY VENTURELLA, AND DIANA P. BERTOLLT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

Amici are law professors who, with the consent of the parties, hope to address more directly than the parties the ingredients of our complex federal structure that we believe are significantly implicated by state laws imposing length of residence restrictions. From our perspective this case is primarily about the structure of the Union and its embedded constitutional norms. That is a perspective we hope the Court will find informative.

SUMMARY OF ARGUMENT

State classifications that treat one class of bona fide residents less favorably than another, premised on the disfavored group's more recent migration from another State, conflict with the deepest constitutional values embodied in the American federal structure. They should be presumptively forbidden. The centrality of first principles of political union, together with the importance of freedom of interstate migration that derives from and reinforces that union and is essential for our people to secure the advantages of federalism, necessitates that the recognized legislative autonomy of the States not be employed to risk impairment of the unified federal structure within which they function, or of the systemic constitutional benefits it provides.

This Court's rulings are fully and wisely consistent with these imperatives. That various Justices at times have differed over the proper textual or doctrinal sources of the constitutional limitation on state power to impose length of residence distinctions should not be allowed to obscure the sound uniformity of the resulting decisions. Statutes like California's in this case plausibly impair constitutional guarantees of **intra**state equality under either the Fourteenth Amendment's Citizenship Clause or Equal Protection Clause; of **inter**state equality under Article IV, § 2's Privileges and Immunities Clause or the dormant Commerce Clause; of the fundamental right of interstate migration under the commerce clause, Article IV, § 2, or the Fourteenth Amendment's Privileges and Immunities Clause; or any of these constitutional guarantees by virtue of structural interpretation of the premises of the United States federal system. Only an artificial disaggregation of the constitutional components of that structure could lead to a result that would enable the States freely to single out newcomers for less favored treatment than their inhabitants of longer duration. Instead, the whole should at least equal, if not exceed, the sum of the parts.

Accordingly, state laws treating recent residents less favorably than longtime residents should not be permitted absent extraordinary justification, if at all, unless those laws genuinely seek, in an appropriately limited fashion, to ensure bona fide residency, or perhaps themselves genuinely respond to the imperatives of good interstate relations or other elements of our federal structure. The disfavoring of recent migrants by California's statute does not purport to test bona fide residency, is

inimical to the values of a political union, and may not even be rationally related to a legitimate state purpose, much less be able to withstand the requirements of any significantly more demanding standard of review.

It is the stratification of a State's residents according to the recency of having settled in the State, not just an actual barrier or deterrent to interstate movement, that is inconsistent with the system of national cohesion and free interstate mobility. That is why, even if California can somehow convince this Court that it has a legitimate purpose in making its length of residence distinction, and even if its reduced benefit plan in theory may burden the right of interstate migration, standing alone, less than did the benefit denial laws invalidated in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the statute remains unconstitutional. Moreover, California's law exacerbates the stratification problem by continuously dividing its new residents who otherwise qualify for welfare benefits into forty-nine separate subclasses of reduced benefits recipients (more, if migrants from federal territories are considered) based on the level of benefit provided in the State from which they emigrated. The risk of multiplication of laws subdividing a State's new residents according to their previous State of residence, if California's law is upheld, is as apparent as is its inconsistency with the constitutional primacy of the Union.

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ARGUMENT

I.

THE POLITICAL UNIFICATION, INTRASTATE AND INTERSTATE EQUALITY, AND FREEDOM OF INTERSTATE MIGRATION OBJECTIVES OF THE CONSTITUTION LEAVE LITTLE ROOM FOR STATE LAWS CLASSIFYING BONA FIDE RESIDENTS BY LENGTH OF RESIDENCE.

The formation of "a more perfect Union" is the first purpose the preamble declares for the establishment of the Constitution. To be sure, the Framers intended the structure created by the Constitution to be, in Madison's words, "in strictness, neither a national nor a federal Constitution, but a composition of both."[1] The preservation of state autonomy certainly was not intended to impair the Union's paramount role in safeguarding our Nation against external threat and internal strife[2], however, and indeed, one of the primary benefits of preserving "[t]his federalist structure of joint sovereigns" is to "make[ ] government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The constitutional right of interstate mobility, which is well established though still not "ascribe[d] . . . to a particular constitutional

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[1] THE FEDERALIST No. 39 (Madison), at 246 (C. Rossiter ed. 1961).

[2] *See* sources cited in Jonathan D. Varat, "Economic Integration and Interregional Migration in the United States Federal System," in *Comparative Constitutional Federalism: Europe and America* 23-24 (Greenwood Press 1990).

provision," *Shapiro*, 394 U.S., at 630,[3] is accordingly not only grounded in, but intimately connected to, both the political unification objectives of the Constitution and the individual's right to take advantage of one of the primary

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[3] In *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902-03 (1986), Justice Brennan's plurality opinion noted that the "textual source of the constitutional right . . . of free interstate migration . . . has proved elusive[,]" but that "[w]hatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases." (citations omitted). The Court said in *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982), that "[t]he right to travel and to move from one state to another has long been accepted, yet both the nature and the source of that right have remained obscure." As support for the existence of the fundamental right of interstate migration the Court and its Justices sometimes have relied on the interstate privileges and immunities clause of Article IV, § 2, *see, e.g., Zobel v. Williams*, 457 U.S. 55, 73-74 (1982) (O'Connor, J., concurring in judgment); *United States v. Wheeler*, 254 U.S. 281, 297-98 (1920); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J.); sometimes on the structural implications of the right to make demands upon or to respond to demands made by the federal government, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43-44 (1868); sometimes on the dormant commerce clause, *Edwards v. California*, 314 U.S. 160 (1941); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849); sometimes on the Fourteenth Amendment's prohibition on state abridgement of the privileges and immunities of national citizenship, *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); and even on Fourteenth Amendment Due Process, *see Williams v. Fears*, 179 U.S. 270, 274 (1900). Historical support for the view that the Framers of the Fourteenth Amendment specifically intended its Privileges and Immunities Clause to guarantee the right to travel freely among the states may be found in Seth F. Kreimer, "The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism," 67 N.Y.U.L.Rev. 451, 500-507 (1992).

benefits of state autonomy within the overall federal structure. As Justice O'Connor has written:

> " . . . It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), it allows the individual to settle in the State offering those programs best tailored to his or her tastes." *Zobel v. Williams*, 457 U.S. 55, 76-77 (1982) (O'Connor, J., concurring in judgment).[4]

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[4] *Accord*, Varat, *supra* note 2, at 31: "[O]ne of the very values of preserving state autonomy – to preserve diverse communities for the benefit of its people – points, in a unified nation, to the preservation of the right of the people to move freely between states as a means of taking advantage of the benefits of state autonomy. That choice, after all, is a national value." More broadly:

> "[T]here are important systemic connections among the right freely to migrate from state to state, the right of new residents to be treated equally with longer-term residents, and the right of state autonomy. When all are taken together, what is enforced is the right of Americans to freely choose where to settle, knowing that, as bona fide residents, they will enjoy the equal benefit of whatever diverse effects state autonomy has produced." *Id.*, at 34.

See also Kreimer, *supra* note 3, at 501:

> "The purpose of the [Art. IV] privileges and immunities clause, like its predecessor in the Articles of Confederation, was to recognize a national identity that made states fellow-members of a broader polity. One of the constituents of that identity was the right of citizens of each of the newly-formed United States to travel among the states on a basis of equality."

The joint operation of the Constitution's concerns with political union **and** individual freedom to settle throughout that union (including the right to take advantage of the benefits of federalism) of course guarantee at a minimum the individual's right to travel or migrate interstate free of unreasonable "burdens," as traditionally understood. When the Court in *Shapiro* remarked on the longstanding recognition "that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement[,]" 394 U.S., at 629, the principle carried at least this much force. Yet the Court's holding that any state classification that serves to "penalize" the exercise of the constitutional right of interstate travel is unconstitutional "unless shown to promote a *compelling* governmental interest[,]" *id.*, at 634, seemed to go further and disallow lesser burdens. *Dunn v. Blumstein*, 405 U.S. 330 (1972), invalidating long durational residency requirements for voting, and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), invalidating a one-year residency requirement for non-emergency medical care at county expense, confirmed that such state classifications could "penalize" the exercise of the right of interstate migration without actually deterring it or burdening it in the traditional sense.

That the Court generally would disallow disfavoring classifications based on recency of interstate mobility, without requiring independent proof that mobility had been substantially burdened in any conventional sense, should not be surprising once the political unification

implications of such classifications are taken into account along with the freedom of interstate migration implications. For classifications that officially, unnecessarily, and gratingly tend to denigrate the status of new residents despite their common membership in the Union provoke sensitivities based on state of origin that risk discord among the States and threaten interstate harmony.

In that light the Court's decision in *Zobel v. Williams*, 457 U.S. 55 (1982), invalidating an Alaska statute distributing natural resource income to the State's adult residents in shares that increased for each year of in-state residence, is readily understood, despite the fact that ineligibility for as large a share of the bonus as longtime residents would receive may have been unlikely to have had much of an inhibiting impact on migration to Alaska. Although the Court held the law a denial of equal protection for failing to meet the minimum rationality test, it acknowledged that "[i]n addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." *Id.*, at 60 n.6. Moreover, in concluding that it would be "clearly impermissible" for the states to divide citizens into expanding numbers of permanent classes depending on length of residence, the Court referred approvingly to Chief Justice Taney's comment, dissenting in *The Passenger Cases*, 7 How. 283, 492 (1849), that "[s]uch a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it."

Justice Brennan's concurring opinion, for himself and Justices Marshall, Blackmun, and Powell, emphasized more explicitly that "the federal interest in free interstate migration [was] clearly, though indirectly, affected by the Alaska dividend-distribution law, . . . provid[ing] an independent rationale for holding that law unconstitutional." 457 U.S., at 66. He felt that "the right to travel achieves its most forceful expression in the context of equal protection analysis" but also declared the Alaska scheme "inconsistent with the federal structure even in its prospective operation." *Id.*, at 67.

Justice O'Connor's opinion, concurring in the judgment, may have spoken most clearly to the force of the connection between length of residence distinctions and the imperatives of political union, however. She did so by appreciating that a State's unequal treatment of new residents is tantamount to denying "*non-Alaskans* settling in the State the same privileges afforded longer term residents[,]" *id.*, at 73 (emphasis supplied), an inequality that "conflicts with the constitutional purpose of maintaining a Union rather than a mere 'league of States.' See *Paul v. Virginia*, 8 Wall. 168, 180 (1869)[,]" *id.*, and thus had to be measured by the demanding standards of the Privileges and Immunities Clause of Art. IV, § 2. Under that Clause the disparate treatment of recently arrived nonresidents constitutes the burden on the right to establish residence; "the 'burden' imposed on nonresidents is relative to the benefits enjoyed by residents." *Id.* at 76 n.6.

Subsequently, the Court held that a New Mexico statute providing a property tax exemption to only those Vietnam veterans who resided in the State before May 8, 1976, failed minimum rationality review under the Equal

Protection Clause, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), and that a New York statute granting a preference in civil service employment solely to resident veterans who lived in the State when they entered military service violated the constitutional rights of resident veterans who lived outside the State when they entered the military, *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), four members of the majority finding a violation of both the constitutional right to migrate and equal protection and two concluding that the classification only violated equal protection because it was irrational. The Court reached those results despite objections noted by the dissents in both cases that, unlike the *Shapiro* line of durational residency requirement cases, and unlike *Zobel*, the disfavored groups of veterans were no more disfavored than the bulk of longtime residents who were not veterans, and hence no sharp line disadvantaging former nonresidents was at issue. 472 U.S., at 629-30 (Stevens, J., dissenting); 476 U.S., at 922 (O'Connor, J., dissenting) ("[T]he New York scheme does not effectively penalize those who exercise their fundamental constitutional right to settle in the State of their choice by requiring newcomers to accept a status inferior to that of all oldtime residents of New York upon their arrival. . . . Those veterans who were not New York residents when they joined the United States Armed Forces, who subsequently moved to New York, and who endeavor to secure civil service employment are treated exactly the same as the vast majority of New York citizens or even the majority of candidates against whom they must compete in obtaining civil employment.")

Whatever may be said of *Hooper* and *Soto-Lopez*, however, the present case falls squarely within the parameters of the Court's precedents invalidating *length* of residence classifications. Like the new residents in *Shapiro*, *Dunn*, *Memorial Hospital*, and *Zobel*, and unlike the plaintiffs in *Hooper* and *Soto-Lopez*, the new California residents in this case are "requir[ed] to accept a status inferior to that of all oldtime residents . . . upon their arrival." *Id.* That is impermissible absent a high level, perhaps an impossibly high level, of justification. That was probably so from the moment of the Constitution's ratification, or even before, and, if anything, is even more clearly so since the ratification of the Fourteenth Amendment.

A. EVEN WITHOUT THE FOURTEENTH AMENDMENT, STATE LENGTH OF RESIDENCE CLASSIFICATIONS ARE PRESUMPTIVELY INVALID.

The understanding that implicit in our Federal Union is a right of free interstate migration, and that ensuring national unity entails that a State generally may not disfavor the citizens of another State, was reflected in Article IV of the Articles of Confederation and was carried over in both the commerce clause and the Privileges and Immunities Clause of Article IV, § 2.[5] It is barely a step to connect the two and insist that state power to disfavor residents who recently migrated from another State be carefully circumscribed.

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[5] *See* Jonathan D. Varat, "State 'Citizenship' and Interstate Equality," 48 U. Chi. L. Rev. 487-490 (1981).

Justice O'Connor has cited that history and connection in finding Article IV, § 2 to be the appropriate constitutional provision by which to measure the validity of length of residence classifications. 457 U.S., at 78-81. Others have argued that the irreconcilability of state discriminations against the interstate movement of persons "with the very idea of nationhood" should render durational residence restrictions on welfare invalid under the dormant commerce clause.[6] Perhaps the common interstate equality thread that binds these two original

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[6] Stephen Loffredo, " 'If You Ain't Got the Do, Re, Mi': The Commerce Clause and State Residence Restrictions on Welfare," 11 Yale L. & Policy Rev. 147, 193 (1993). Noting that the "ideal of national unity assumes special force and value during times of national crisis or periods of economic downturns, as states attempt to secede from problems of national scope[,]" Professor Loffredo elaborates:

> "Durational residence restrictions on welfare undermine the goal of national solidarity in at least three respects. First, they abort the possibility of a national response to poverty in favor of a beggar-thy-neighbor approach that seeks to export the problem instead of solve it. Second, durational residence restrictions provoke internecine rivalries and destructive competition among the states. The adoption of such restrictions . . . invariably triggers a chain reaction. . . . And the political discourse surrounding these laws is rife with hostile cross-border fingerpointing and invective. Lastly, and most importantly, the proliferation of state laws designed to restrain the interstate movement of American citizens is antithetical to the very concept of nationhood. . . . [W]hether one conceives of durational residence restrictions as an attempt to fence out needy Americans from other states or as the relegation of poor newcomers to a de jure subordinate caste, such legislation strikes at the heart of national

constitutional provisions, adopted as joint instruments of national unification, should be emphasized.[7]

Assuming, as Justice O'Connor rightly does, that the protection of the interstate Privileges and Immunities clause is triggered by an activity – choosing to settle in a new State – that is "basic to the maintenance or well-being of the Union[,]" *Baldwin v. Fish & Game Commission*, 436 U.S. 371, 388 (1978), the normal Art. IV, § 2 analysis would ask whether " 'non-citizens constitute a peculiar source of the evil at which the statute is aimed' " and, if so, whether there is a demonstrated " 'substantial relationship' between the evil and the discrimination practiced against the noncitizens." 457 U.S., at 76 (quoting *Hicklin v. Orbeck*, 437 U.S. 518, 525-27 (1978)). If dormant commerce clause analysis applies, however, "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). The Court noted in that decision that it had

> "consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk . . . ; or to create jobs by keeping industry within the State . . . ; *or to preserve the State's financial resources from depletion by fencing out indigent immigrants, Edwards v. California*, 314 U.S. 160, 173-174. In each of these cases, a presumably legitimate goal was sought

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union by rejecting one of its irreducible attributes: the concept of national citizenship." *Id.*, at 194-95.

[7] *See* Varat, *supra* note 5, at 518-19.

> to be achieved by the illegitimate means of isolating the State from the national economy." *Id.*, at 627 (emphasis supplied).

With respect to the length of residence distinction at issue in this case, and like classifications, it is extremely unlikely that the demanding standards of justification under Art. IV analysis could be met, and so it may not be necessary to choose between those and the even more restrictive commerce clause standard. Were it necessary to choose, at least three reasons might suggest that something like the virtually per se rule of invalidity be applied. First, the independent force of the dormant commerce clause argues in favor of that solution. Second, the two provisions might be seen, not as alternatives, but as jointly supporting a particularly vigorous nondiscrimination rule. Third, and perhaps most importantly, insofar as these provisions protect against a State's unfavorably disparate treatment of its new residents, those residents must now look primarily to their State of current residence, not the State from which they migrated, for the benefits of government, whereas in the usual case of discrimination against nonresidents the disfavored nonresident at least can seek those benefits from his or her own home State as well.

B. TAKING ACCOUNT OF THE FOURTEENTH AMENDMENT ONLY FORTIFIES THE PRINCIPLE THAT STATE LENGTH OF RESIDENCE CLASSIFICATIONS ARE PRESUMPTIVELY INVALID.

If separate constitutional warrant were thought to be necessary to connect the right of free interstate mobility, and the right of interstate equality, that are foundational

components of our Federal Union, in such a way as to impose on the States an obligation to avoid intrastate inequality or stratification resulting from classifications based on the exercise of the (former nonresident's) right to migrate interstate, surely the adoption of the Fourteenth Amendment provides that warrant. One might understand the significance of the Fourteenth Amendment in two different ways. First, the Equal Protection Clause might be seen as a particularly appropriate source of obligation limiting state power to disfavor recent immigrants who are now acknowledged to be part of the state citizenry to whom the State owes a duty of impartiality, because the classification touches on the fundamentals of political union and free interstate migration in the context of a constitutional requirement of intrastate equality. Sensitivity to the risk that States might consign new residents to an inferior status, as compared to long-time residents, driven by the attendant implications for interstate discord and potential interference with interstate mobility, has appeared to undergird the Court's consistent pattern of equal protection rulings over the last quarter-century, whether formally articulated as applying "strict scrutiny" or "minimum rationality review."

Second, one might find either in the Citizenship Clause of the Fourteenth Amendment, which bestows state citizenship on all United States citizens who choose to "reside" in a particular State, or in the Fourteenth Amendment's Privileges and Immunities Clause, a right to "become[ ] a full-fledged member of the state community immediately upon establishing residence there." William Cohen, "Equal Treatment for Newcomers: The Core

Meaning of National and State Citizenship," 1 *Constitutional Commentary* 9, 17 (1984). With respect to those "state privileges and benefits that the state can limit to its own citizens" – those, like welfare benefits, where "a state is not required to share its treasury with the nation at large" – there exists "an obvious corollary": "One aspect of full sovereignty denied to the states is the power to determine membership in the [state] community." *Id.*[8] On this view, "durational residence requirements for state benefits and services are permissible only to the extent they respond to a reasonable concern for proof of domiciliary intent." *Id.*, at 19. As applied specifically to the statute challenged in this case, the argument is clear:

> " . . . United States citizens become citizens of the states wherein they reside. There are no waiting periods. And, just as it would violate the Constitution to deny these new arrivals state citizenship, it would violate the Constitution to concede their citizenship in name only while treating them as if they were still citizens of other states. That should mean that it is unconstitutional to deny benefits to new citizens that are extended to other citizens similarly situated – subject only to reasonable assurances that claims of new residence are bona fide." William

[8] *See also*, Kreimer, *supra* note 3, at 506:
"National union entailed national citizenship as the primary allegiance, a fact expressly recognized in the adoption of the citizenship clause of the fourteenth amendment. The definition of state citizenship was derived from national citizenship: any United States citizen was ipso facto a citizen of the state in which she resided."

> Cohen, "Discrimination Against New State Citizens: An Update," 11 *Constitutional Commentary* 73, 79 (1994).

* * *

The unifying theme of these varying approaches, both with and without the Fourteenth Amendment, is that classifying bona fide residents in a fashion that singles out recent migrants for relative disadvantage is presumptively invalid and cannot easily be justified, if at all. Just how much more justification than that required to withstand analysis under Article IV, § 2 should be demanded to permit such a classification may remain uncertain, but the common ground is that length of residence distinctions among a state's bona fide residents implicate concerns of national unity and freedom of interstate migration sufficiently that they are to be used only sparingly, at best.

C. NEITHER REASONABLE MEASURES OF BONA FIDE RESIDENCY, NOR THIS COURT'S DECISION IN SOSNA V. IOWA, 419 U.S. 393 (1975), UNDERMINE THE PRINCIPLE THAT STATE LENGTH OF RESIDENCE CLASSIFICATIONS ARE PRESUMPTIVELY INVALID.

As this Court has well understood, " 'appropriately defined and uniformly applied bona fide residency requirements' " are presumptively valid, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255 (1974) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 342 n.13 (1972)), whereas durational residency requirements are not. The reason for the former is that the constitutional recognition of state policy autonomy in our federal structure necessitates and

justifies state power to prefer residents, as distinguished from nonresidents, with respect to at least most state-created benefits.[9] Implicit in legitimate state power to treat residents and nonresidents differently is some power to define residency, but in a fashion that does not make a mockery of the presumptive constitutional invalidity of length of residence distinctions.

With respect to most lengthy residence distinctions, this Court has refused to accept the claim that they served appropriately as a measure of bona fide residence. That certainly was true in *Shapiro* with respect to the one year waiting period for eligibility to receive welfare benefits, 394 U.S., at 636, and is equally true here. In fact, the bona fide residence of respondents appears to be conceded here. The only exception has been the Court's willingness to accept a one year residency requirement for lower in-state university tuition as "a test of bona fide residence," *Zobel v. Williams*, 457 U.S., at 64 n.13 (explaining why "*Starns v. Malkerson*, 326 F.Supp. 234 (Minn. 1970) cannot be read as a contrary decision of this Court" to the impermissibility of state efforts to divide citizens into expanding numbers of permanent classes). The incentives and opportunities to fake residency may explain the Court's tolerance for long durational residency requirements for the tuition benefit, since "[t]he differences between out-of-state and in-state tuition are substantial, and domiciliary intent is a particularly difficult factual issue in the case of college students." Cohen, *supra*, 1 Constitutional Commentary, at 19-20. *See Vlandis v. Kline*, 412 U.S. 441, 453-54 (1973) (a state may "establish

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[9] *See* Varat, *supra* note 5, at 519-30.

such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.")

Sosna v. Iowa, 419 U.S. 393 (1975), which sustained a one-year durational residency requirement to qualify as a petitioner in a divorce action, is also compatible with a rule resting on the imperatives of interstate harmony in a Federal Union that presumptively invalidates state laws establishing length of residence distinctions. Thus, petitioner is mistaken in believing that *Sosna* is "inexplicable" unless strict scrutiny is "reserved for statutes which impose a significant and severe penalty on travel." Petitioners' Brief, at 15.

Even on its own terms, *Sosna* is readily distinguishable from the present case. The Court made slight reference to Sosna's apparent failure to convince the state court judge that she had alleged "good-faith residence." *Id.*, at 409 n.22. It emphasized that the "[a]ppellant was not irretrievably foreclosed from obtaining some part of what she sought, as was the case with the welfare recipients in *Shapiro*, the voters in *Dunn*, or the indigent patient in *Maricopa County*," *id.*, at 406, or, one might add, as is the case currently before the Court. Primarily, however, the Court found *Sosna* distinguishable from the earlier cases because the "residency requirement may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience[,]" *id.*, at 406, and it held "that the state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State, as well as a desire to

insulate divorce decrees from the likelihood of collateral attack, requires a different resolution . . . than . . . in *Shapiro*, . . . *Dunn*, . . . and *Maricopa County* . . . [,]" *id.*, at 409. Here again the present case is virtually identical to *Shapiro* with respect to the nature of the budget and administrative-based state interests proffered. Moreover, there is no apparent question of the respondents' attachment to California as bona fide residents.

Justice O'Connor distinguished the length of residence classification sustained by the Court in *Sosna* from the one she found impermissible under Art. IV, § 2 in *Zobel* by suggesting that Iowa "showed that non-residents were a peculiar source of the evil addressed by its durational residency requirement" as "[t]hose persons could misrepresent their attachment to Iowa and obtain divorces that would be susceptible to collateral attack in other States." 457 U.S., at 78 n.8. The Court's opinion in *Sosna* also noted that the requirement "furthers the State's parallel interests both in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack." 419 U.S., at 407.

Highlighting these features of *Sosna* indicates how different the usual length of residence distinction, including the one in this case, is, as related to the underlying national unity values that ground a presumptive rule against length of residence distinctions. To the extent that the Iowa durational residency requirement for divorce itself furthered the minimization of interstate conflict by not undermining the legitimate jurisdiction of another State, the basic values giving rise to the presumptive rule were not impaired. Moreover, the Court took explicit note

that "Iowa's interests extend beyond its borders and include the recognition of its divorce decrees by other States under the Full Faith and Credit Clause of the Constitution, Art. IV, § 1." *Id.* These considerations stand in stark contrast to durational residence restrictions like California's, which can neither fairly be characterized as efforts to avoid "officious intermeddling" in another State's efforts, nor be justified by reference to a separable constitutional provision, like the Full Faith and Credit Clause, that addresses another facet of interstate harmony. Rather, they must be understood as continuously emphasizing the second-class status of those who recently migrated from another State. If an exception from the presumptive rule should be recognized in the rare case when a length of residence distinction arguably serves to promote good relations among the States, it surely should not encompass the more common instances where the risk of impairment of good interstate relations is present.

II.

BY CREATING MULTIPLE, CONTINUOUS CLASSES OF NEW RESIDENTS, SUBDIVIDED ON THE BASIS OF STATE OF ORIGIN, EACH OF WHICH IS TREATED LESS FAVORABLY THAN LONGTIME RESIDENTS, THE CALIFORNIA STATUTE IS PRESUMPTIVELY INVALID.

The solid, multi-layered foundation supporting the Court's precedents invalidating length of residence distinctions should make clear that petitioners' attempts to distinguish the waiting period cases, *Hooper* and *Soto-Lopez*, as cases of total, rather than partial, foreclosure of

benefits, and to distinguish *Zobel* as a case involving permanent, rather than temporary, distinctions, are unavailing. Unlike petitioners' exclusive focus on the Fourteenth Amendment Equal Protection Clause, the Court and many of its Justices over an extended period of time have appreciated the need to control length of residence classifications, because of the potential threat they pose to the most fundamental features of the Federal Union. The Court's explicit recognition in *Zobel* that protection against differential treatment of new residents per se sufficed, as an alternative to protection from actual barriers to interstate travel, to limit length of residence distinctions, was not limited in the way petitioners suggest. More fundamentally, to accept petitioners' approach would be to eviscerate the strength of the Court's attachment to the joint interests in political union and interstate freedom of mobility. That attachment ought to be reaffirmed and strengthened, not diluted.

The particulars of the California scheme only emphasize its incompatibility with the underpinnings of the Federal Union. Each person who migrates to California from another State may be relegated to an inferior status for having done so for "only" a year, but a perpetual class of newcomers would be sorted continually into different categories as they arrived based on what State (or federal territory) they had just left. Setting aside for the moment California's purpose to fence out indigent immigrants, and the likely effect it would have on deterring migration, both features absent in *Zobel*, the California law is even more inimical to political union in its subdividing of new residents by State of origin than was the Alaska law in *Zobel* in its many layers based on length of residence as

such. Justice O'Connor's argument in *Zobel* that Art. IV, § 2 should have been applied, because "Alaska's scheme classifies citizens on the basis of their former residential status[,]" 457 U.S., at 75, is literally and comprehensively true under the California scheme. It is bad enough from the perspective of the individuals who would have to wait a year to be treated as equal members of the state community. Yet from the perspective of the systemic interest in national cohesion, a proliferation of such breakdowns by state of former residence would be nightmarish. It is hard to imagine a classification system more incompatible with the notion of a unified nation, with the notion of a system of free interstate migration, or with the notion of state obligations to treat all its bona fide residents as full members of the state citizenry.

California apparently has gone even further in gratuitously ignoring its obligations as part of the Union. The statutory ineligibility of recent migrants from other States and federal territories for welfare assistance at the same level as longtime residents apparently does not extend to recent legal immigrants from other countries! Joint Appendix 65. Surely the obligations of Union and intrastate equality demand more than this form of trivialization.

Finally, the detrimental effect of length of residence distinctions on out-migration, as well as on in-migration, or on decisions whether to settle elsewhere for a time but possibly migrate back again, should be considered. As Justice Brennan noted in his separate opinion in *Zobel*, 457 U.S., at 68, "if each State were free to reward its citizens incrementally for their years of residence, so that a citizen leaving one State would thereby forfeit his

accrued seniority, only to have to begin building seniority again in his new State of residence, then the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order, would not long survive." Although a statute like California's does not allow the accruing of seniority beyond one year, persons on welfare who otherwise might contemplate moving to another state for a potential work opportunity might be inhibited from migrating for fear that if the move does not work out the family will have to start all over again, upon returning to California, at a level of assistance potentially lower than is now being received. (That these concerns apparently would not be present for migration to, and return from, another country only reinforces the point.)

In short, the California statute is a prime example of a state refusal to treat its new bona fide residents in accordance with the fundamental tenets of national unity, freedom of interstate migration, and the obligations of impartiality owed to all a state's bona fide residents.

III.

CALIFORNIA HAS PROVIDED NO JUSTIFICATION FOR ITS STATUTE THAT REMOTELY OVERCOMES ITS PRESUMPTIVE INVALIDITY.

For the reasons already presented, unless genuinely employed in an appropriately limited fashion to test bona fide residency, or justified by operating to promote rather than potentially irritate interstate harmony, state length of residence restrictions should be held invalid per se, or

at least invalid absent the most extraordinary justification. Even under an unmodified application of Article IV, § 2 analysis, laws like that challenged here cannot stand unless nonresidents are shown to be a peculiar source of the evil at which the statute aims and the state demonstrates a substantial relationship between the evil and the discrimination. But the justifications offered for California's statute may not even survive minimum rationality review.

The legitimacy of California's interest in reducing its welfare budget is not in issue, but the method by which it seeks to do so is. It is the distinction between newer and longtime residents that requires overriding justification, not the ability to reduce aggregate welfare expenditures, whether generally or in some selective fashion that does not violate independent constitutional guarantees, as this method of selection so clearly does.

Policies designed to save scarce resources through a mechanism that directly targets interstate migration conflicts directly with the premises of Union and must not be allowed, as *Shapiro* clearly held. Not only is "the purpose of inhibiting migration by needy persons into the State . . . constitutionally impermissible," 394 U.S., at 629, but "a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally." *Id.* Those objectives, and this mechanism of welfare expenditure reduction, are no more valid in the form of a purported legitimate purpose in "studying the effect of welfare reform initiatives," Brief of Petitioner 21, than in the unvarnished form in which they were presented in *Shapiro*. As in *Shapiro*, moreover, there is no basis in fact for assuming that all, or even a

substantial number, of persons eligible for assistance who migrate to California do so solely to obtain higher welfare benefits.

In any event, under an elevated level of scrutiny, it is certain that the California statute cannot survive analysis. California has made no attempt to demonstrate that new residents from other parts of the Union seeking welfare are a peculiar source of its budgetary problems. In the midst of its most significant economic downturn since the Great Depression, it seems exceedingly unlikely that it could succeed in doing so. Moreover, the immediate eligibility of legal immigrants from foreign nations undermines the credibility of any assumption that the State sought to pinpoint a peculiar source of the stress on its welfare budget. Rather than choose the mechanism that, if permissible at all, should have been the last resort, California singled out newcomers for disproportionate benefits reductions, without regard to the cost of living, and most importantly, without regard to the policy's incompatibility with the constitutional norms inherent in our Federal Union.

CONCLUSION

The judgment of the Court of Appeals should be affirmed. The Court should declare that state laws imposing length of residence classifications disadvantaging new bona fide residents are presumptively invalid as irreconcilable with the interstate mobility, interstate

equality, and intrastate equality premises of our Federal Union.

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APPENDIX

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